SUPREME COURT, U. S.

FILED

JUN 30 1975

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1503

EDWARD KECKEISEN,

Petitioner,

vs.

INDEPENDENT SCHOOL DISTRICT 612, Glenwood, Minnesota; RICHARD KAUS, Chairman of School Board, Independent School District 612; JOANNE SOLMONSON, Clerk of School Board, Independent School District 612; LeROY KNUTSON, Member of School Board, Independent School District 612; ROBERT ROBARDS, Member of School Board, Independent School District 612; RICHARD THOMPSON, Member of School Board, Independent School District 612; ELAINE BENNETT, Member of School Board, Independent School District 612; JERRY LEEDAHL, Member of School Board, Independent School District 612,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE MINNESOTA SCHOOL BOARDS ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

PETER S. POPOVICH of
Peterson, Popovich,
Knutson, & Flynn, P.A.
314 Minnesota Bldg.
St. Paul, MN 55101
612 - 222-5515
Attorney for Amicus Curiae
Minnesota School Board Association

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Consent	2
Interest of Amicus Curiae	2
Argument:	
The Decision of the United States Court of Appeals for the Eighth Circuit in This Case Is Not in Conflict With Applicable Decisions of This Court	3
A. The School Board Action Does Not Prohibit Marriage: *Loving vs. Virginia* Distinguished	3
B. A School Board May Reasonably Anticipate That Problems Will Inhere or Result From the Conflict of the Marital and the Supervisory Interests: *Tinker vs. Des Moines School District* Distinguished	7
C. The School Board Action Here Is Not Sex or Other Discrimination in Violation of Title VII, Nor Has Any Such Violation Been Alleged: *Griggs vs. Duke Power Company* Distinguished	10
Conclusion	12

TABLE OF CITATIONS

	PAGE
EEOC Decisions, No. 70-453, Case YBI 96-012, January 19, 1970, CCH Employment Practices Reporter §1250.40	11
Griggs vs. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed 2d 158 (1971)	3, 10, 11
Keckeisen vs. Independent School District 612, 509 F.2d 1062 (Eighth Circuit, 1975)	2, 5, 6, 9, 10
Loving vs. Commonwealth of Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed 2d 1010 (1967)	3, 4, 5
Tinker vs. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed 2d 731 (1969)	3, 7, 8, 9

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1503

EDWARD KECKEISEN,

Petitioner,

vs.

INDEPENDENT SCHOOL DISTRICT 612, Glenwood, Minnesota; RICHARD KAUS, Chairman of School Board, Independent School District 612; JOANNE SOLMONSON, Clerk of School Board, Independent School District 612; LeROY KNUTSON, Member of School Board, Independent School District 612; ROBERT ROBARDS, Member of School Board, Independent School District 612; RICHARD THOMPSON, Member of School Board, Independent School District 612; ELAINE BENNETT, Member of School Board, Independent School District 612; JERRY LEEDAHL, Member of School Board, Independent School District 612,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF THE MINNESOTA SCHOOL BOARDS ASSOCIATION IN OPPOSITION TO PETITION FOR CERTIORARI

CONSENT

Counsel for Amicus Curiae has obtained the consent to the filing of this brief in opposition to petitioner's writ of certiorari from counsel for the petitioner and the respondent.

INTEREST OF AMICUS CURIAE

The Minnesota School Boards Association represents approximately 435 school boards in Minnesota. The Association has an interest in the outcome of the case because the outcome may have significant ramifications on personnel policies, and school administration for all school boards in the state, and because to grant the relief sought would foster, in the words of the opinion of the Court of Appeals for the Eighth Circuit below,

> "conflicts of interest in the administration of education [which] are clearly subversive of the state's interest." 509 F.2d at 1065.

ARGUMENT

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THIS CASE IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Petitioner asserts only one reason why this Court should grant a writ of certiorari in this case: the United States Court of Appeals for the Eighth Circuit has decided federal questions of substance not in accord with previous decisions of this Court. This assertion is incorrect.

Petitioner cites only three cases in support of his assertion that the Eighth Circuit Court decision in this case is in conflict with decisions of this Court. The three cases are: *Loving vs. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed. 2d 1010 (1967); *Tinker vs. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed 2d 731 (1969); *Griggs vs. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L. Ed 2d 158 (1971).

But, petitioner himself acknowledges by his discussion of the three cases their distinguishability from this case.

A. The School Board Action Does Not Prohibit Marriage: Loving vs. Virginia Distinguished.

Petitioner expressly concedes that this case is distinguishable from *Loving*.

> "In the case at hand, what we have is not a prohibition against marriage, as in the *Loving* case, ..." Petition, p. 10.

What petitioner fails to point out is that the distinctions between *Loving* and this case go far beyond the fact that

Loving involved the prohibition of marriage and this case does not. The opinion of this Court in *Loving* stated:

> "There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race." 388 U.S. at 11, 87 S.Ct. at 1823, 18 L.Ed 2d at 1017.

This case does not involve distinctions drawn according to race. Further *amicus* is aware of no decision of this Court or any other Court which has held that a classification of the kind involved in this case is a suspect classification necessitating the strict scrutiny required of racial classifications such as the one at issue in *Loving*.

The opinion of this Court in *Loving* also pointed out that:

> "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." 388 U.S. at 11, 87 S.Ct. at 1823, 18 L.Ed 2d at 1017.

and later in the same opinion pointed out again that:

> "To deny this fundamental freedom [of the right to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process by law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations." 388 U.S. at 12, 87 S.Ct. 1824, 18 L.Ed 2d at 1018.

Contrast the absence of any legitimate purpose in *Loving* with the purpose of the policy involved in this case as described in the opinion for the Court of Appeals for the Eighth Circuit:

> "The case at bar is unlike *Loving* in a signally important respect, however. The policy in question here does not deny to people the right to marry; it only prohibits the employment of married couples in administrator-teacher situations. *The stated purpose of the rule is a laudatory one: preventing conflicts of interest and favoritism.* What we have before us then is the state's interest in providing good education for its children — and we have that interest fully and directly before us because *conflicts of interest in the administration of education are clearly subversive of the state's interest* — and, on the other hand, a somewhat attenuated claim involving the right to marry. . . . ." *Keckeisen vs. Independent School District 612,* 509 F.2d 1062 (1975), at 1065, footnote omitted; emphasis added.

Petitioner also overstates the effect of the application in this case of the policy at issue when he states at page 10 of his petition:

> ". . . we have a situation where if two people are teachers in a school district and want to marry, the regulation in the instant case does not prohibit that marriage but requires that one of the parties resign his or her position in the school district."

This case does not involve two classroom teachers working independently of each other, but rather a school principal

with direct and immediate supervisory responsibility over his spouse.

The opinion of the Court of Appeals for the Eighth Circuit below recognized this very important distinction in footnote 2:

> "The portion of the School Board's policy dealing with the employment of husband-wife teams in the same building, where they are not in the administration-teacher relationship, is not challenged on this appeal and is not affected by our holding in this case." 509 F.2d at 1065.

Petitioner also asserts without citation of authority that the school district's action in this case is an unconstitutional invasion of privacy. But petitioner's argument supports rather than negates the wisdom and reasonableness of such a policy for it is the very intimacy of the marital relation which leads to the assertion of the right to privacy and gives rise to conflict when the interest in the marital relation is superimposed on and identified with the supervisory employment interest in the school context.

Viewed in this light, the conflict of interest policy at issue in this case is analogous to the kind of conflict of interest prohibitions common to our legal and ethical system — for example, the common prohibition that a public official may not participate in his official capacity in a transaction in which he has a personal interest.

If the personal interest is so special and intimate that it ascends to the arguably constitutionally protected zone of privacy, there is all the more reason to recognize a conflict

when that interest runs head on into the supervisory interest. Nor can the conflict in this case be dealt with by internal transfers and reassignments because in this small school district there is no possibility for transfer of assignment of either party to avoid the necessary and essential supervisory function of the only school administrator with direct and immediate supervisory responsibilities over the person who holds the position held by petitioner's spouse.

B. A School Board May Reasonably Anticipate that Problems Will Inhere or Result from the Conflict of the Marital and the Supervisory Interests: Tinker vs. Des Moines School District Distinguished.

Petitioner expressly concedes also that the second of the three cases he relies on in support of his petition is distinguishable.

> ". . . this case is distinguishable from dealing with the First Amendment freedoms of students [which was the issue in *Tinker*]." Petitioner, p. 10.

Petitioner asserts that since *Tinker* speaks of the need for material and substantial disruption to justify student suspension that the same standard of disruption must be required in this case. This argument is defective. *Tinker* does not require "some showing of disruption" to justify student suspensions.

The opinion of the Court, in *Tinker*, states:

> ". . . the record fails to yield evidence that the school authorities *had reason to anticipate* that the wearing of armbands would substantially interfere with the work of the school or impinge upon the rights of other students." 393 U.S. at 509, 89 S.Ct. at 738, 21 L.Ed 2d at 742; emphasis added.

and again:

> ". . . the record does not demonstrate any facts which might *reasonably have led school authorities to forecast* substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred." 393 U.S. at 514, 89 S.Ct. at 740, 21 L.Ed 2d at 742; emphasis added.

These two passages indicate that school authorities may take action in reasonable anticipation of disruption without waiting for the disruption to occur.

Indeed, this is the only reasonable reading of *Tinker*, for to suggest that there must be a showing of disruption is to say that school authorities could take no action against a student known to have quietly entered class, without disrupting anyone, but with a bomb in his brief case.

Assuming without conceding that *Tinker* is somehow analogous to this case, if the school board in this case could have reasonably anticipated that the conflict of the marital interest and the supervisory interest would be disruptive of the educational process, then its action would not be forbidden by analogy to any of the principles of *Tinker*.

The record is replete with examples of and expert testimony of the disruptive effects of this kind of conflict of interest. In the opinion for the Eighth Circuit below, some of the disruptive problem areas are noted:

> "Such problem areas would include: evaluation of the teacher's performance by the administrator, disciplinary problems with students in the teacher's classes where the administrator might be called upon to decide a dispute between student and teacher, the disciplining of teachers

themselves, the assignment of classrooms and extra-curricular duties, recommendations for the purchase of supplies and equipment, and the assignment of school aides. There was testimony that the situation could, in light of the above-mentioned areas where a conflict could arise, create a morale problem among the other members of the faculty under the control of the administrator in question. The superintendent testified that there was some competition among faculty members in the areas of classroom assignments, extra duties, requisitioning supplies, and the assignment of school aides.

In light of these considerations, the court cannot say that the Board was clearly wrong in attempting to avoid conflicts before they arose. With so many areas where a conflict could occur, there is a strong possibility that an administrator, no matter how careful he might be, could unintentionally let his judgment be swayed by his close relationship with one of the teachers. It also could place the administrator in the position of having to defend his actions where normally he would not.

This court does not feel that where such definitie possibilities of conflict of interest exist, the Board should be placed under a constitutional burden of having to wait until a conflict of interest becomes a problem situation before it can take any action. The law should not block legitimate measures taken to anticipate problems and avert them." 509 F.2d at 1066.

Thus *Tinker*, if it is apposite at all, is supportive of the school board action in this case.

In at least one other sense this case differs from *Tinker*. While *Tinker* required a reasonable anticipation of disruption,

the policy in this case against husband and wife as supervisor-supervisee recognizes that the marital relation and the supervisory relation are or may be inherently inimical to each other, without any overt disruptive expression.

As the opinion for the Court of Appeals of the Eighth Circuit, below stated:

> "To put the matter more simply, the mere existence of the husband-wife/administrator-teacher situation is bound to have a deleterious effect on the morale of the faculty." 509 F.2d at 1066.

C. The School Board Action Here Is Not Sex or Other Discrimination in Violation of Title VII, Nor Has Any Such Violation Been Alleged: Griggs vs. Duke Power Company Distinguished.

Petitioner next asserts that the conflict of interest policy in this case is analogous to the education and testing requirements which were struck down by this Court in *Griggs vs. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed 2d 158 (1971).

In that case, the Court stated that under Title VII of the Civil Rights Act of 1964:

> ". . . practices, procedures, or tests neutral on their face, and ever neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. . . .
>
> * * * * *
>
> . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." 401 U.S. at 430, 431, 91 S.Ct. 849 at 853, 28 L.Ed 2d, at 163, 164.

Aside from the obvious fact that *Griggs* is a Title VII case involving solely issues of statutory construction and no Title VII claim has been made in this case, petitioner goes far beyond the application of the school district's policy to the facts of this case in an attempt to illustrate the parade of horrors that will result if this petition is denied.

Petitioner claims that school districts throughout the country will systematically eliminate women teachers "merely by passing the rule that teachers within the system may not be married to other teachers within the system". Petition, p. 11.

One need only suggest that if such a practice were indeed implemented, the aggrieved teachers would surely find a remedy for the wrong done them under the authority of Title VII and *Griggs*, but this unlikely possibility has no bearing whatever on this non-Title VII, constitutional claim, involving the termination of a male school principal who with full knowledge of a pre-existing school policy against the employment of both spouses in a principal-teacher situation; marries a teacher under his supervision.

The school board in exercising its discretion as to which of the two spouses to terminate, chose to terminate the spouse who was junior in tenure after the parties refused to determine which was to leave voluntarily, the principal or the teacher coach.

This comports with the only Title VII decision that could be found having anything like facts similar to the instant case. EEOC Decisions, No. 70-453, Case YBI 96-012, January 19, 1970, CCH Employment Practices Reporter §1250.40. In that case,

> ". . . company regulations which left the decision as to which spouse would be terminated to the employees involved, and which provided that the junior of the spouses would be terminated if the spouses could not decide. . . ."

did not constitute sex discrimination.

This school district policy is not neutral; it does exactly what it is intended to do, and what, on its face it appears to do — prohibit the employment of both spouses in a principal-teacher relationship — in order to avoid conflicts of interest, favoritism, staff morale problems and other deleterious effects on the educational system.

CONCLUSION

Based upon the foregoing, this Court should exercise its discretion and deny petitioner's writ of certiorari in this matter.

Respectfully submitted,

Peter S. Popovich and
Richard J. Sands of
PETERSON, POPOVICH,
KNUTSON & FLYNN, P.A.
314 Minnesota Bldg.
St. Paul, MN 55101
612 - 222-5515
Attorneys for Amicus Curiae
The Minnesota School Board
Association

Dated: June 27, 1975